It is noteworthy that as appears from P-1, the plaintiff's solicitors' latter dated 19 August 1981 to the vendor's solicitors, the latter by letter (A-15) of 17 August 1981 challenged the purchasers' right to rescind the contract of purchase. They subsequently changed their minds for reasons best known to them. What is important is that no reference was made to the defendant and even if she was otherwise liable, she was given no opportunity to challenge the purchasers' decision not to proceed with the purchase and the vendor's acceptance of this decision. In my view, she cannot be made liable without having had this opportunity.

After the vendor and the purchaser(s) decided not to proceed with the sale and purchase, the defendant out of goodwill paid the plaintiff $12,000 by way of refund of her profit. As to the remaining amount, the defendant said it had to be recovered from LSL. The plaintiff agreed with her. Accompained by her, the plaintiff went to see LSL and demanded the return of the $20,000 but he denied that he received the money. He also made this denial in court as already indicated. I disbelieve LSL on this. It is to be borne in mind that one certain way LSL could avoid liability for the $20,000 was to ensure that the defendant was liable and my finding is that he gave evidence in an effort to bring this about. It is also to be remembered that by reason of the plaintiff and the defendant not proceeding with the purchase, he made $5,000 less than he would have in that on 12 September 1981, he sold the property to one Tan Liang Song for $170,000.

My findings are that there was no total failure of consideration as between the plaintiff and the defendant and that these parties did not agree to the addition of the legal requisition clause to the option. Even if I am wrong on this, my view is that the defendant cannot be made liable for the $20,000 because the rescission was, in law and in fact, not justified and in any event made and accepted without the defendant being given an opportunity to challenge the actions of the purchaser(s) and the vendor on rescission.

I therefore dismissed the plaintiff's claim with costs. I also ordered that the defendant was not to recover the costs of producing the bundles of documents. No documents were in dispute between the parties and instead of one bundle, there were three bundles before me, necessitating reference from one bundle to another.

Claim dismissed.

Solicitors: *Yap & Yap; Tang & Partners.*

Reported by *Terence Tan Bian Chye*

MALAYSIAN REPORTS

Malayan Banking Berhad v International Tin Council and another appeal

SUPREME COURT (KUALA LUMPUR) - CIVIL APPEAL NOS 29 AND 30 OF 1987
ABDUL HAMID LP, MOHAMED AZMI AND AJAIB SINGH, SCJJ
26 AUGUST 1989

Civil Procedure - Service out of jurisdiction - Monetary claim based on transaction effected in London against defendant out of jurisdiction of High Court - Claim for damages against co-defendant within jurisdiction - Whether s 23(1) of Courts of Judicature Act confers extra-territorial jurisdiction on High Court - Whether service sole foundation of jurisdiction - Whether exceptions exist to general principle that jurisdiction is territorial - Rules of the High Court 1980, O 11 - Courts of Judicature Act 1964, s 23(1)

In this case the appellants had brought an action against the respondents. The first respondents, the International Tin Council ('ITC'), are outside the jurisdiction of the High Court but the second respondent had a place of business within the local jurisdiction of the High Court. The loan transaction on which the claims were based were effected in London but the tin pledged by the ITC as security for the loan was situated within the jurisdiction. The registrar granted leave to the appellants to serve out of jurisdiction a notice of concurrent writ of summons on the ITC in London. On appeal, the learned judge of the High Court set aside the registrar's order. He came to the conclusion that the jurisdiction of the High Court is restricted to those upon whom its process may be served within the territorial jurisdiction and to this general rule the only exception is to be found in O 11 of the Rules of the High Court 1980. The learned judge rejected the argument that s 23(1)(h) of the Courts of Judicature Act 1964 creates another exception to the general rule on extra-territorial jurisdiction of our courts. The learned judge therefore held that the monetary claim was outside the purview of O 11 r 1 of the Rules of the High Court 1980 but the declaratory order sought against the ITC and the other respondent relating to the pledged tin fell under sub-paras (j) or (k) of the said order. The appellants appealed.

Held, allowing the appeals:

(1) Service is not solely the foundation of our High Courts. Apart from O 11 r 1 of the Rules of the High Court 1980, s 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where foreigners overseas are sued as co-defendants with local residents.

(2) In interpreting s 23(1)(b) of the Courts of Judicature Act it must be assumed that the legislature knows the then existing state of the law on the jurisdiction of the High Courts under the Courts Ordinance 1948, and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply. There can be no doubt that Parliament intends to confer on the High Courts extra-territorial jurisdiction in cases where more than one defendant are being sued, so long as one of the several defendants resides or has his place of business within Malaysia.

(3) On the facts there is no dispute that the second respondent has a place of business within the local jurisdiction and that they were one of several defendants in the cases under appeal.

The registrar was correct in law in granting the order that he did and in the result the appeals should succeed.

Cases referred to

1 *Maclaine Watson & Co Ltd* v *Department of Trade* [1983] 3 WLR 1033 (refd)
2 *In Re International Tin Council* [1988] 3 WLR 1159 (refd)
3 *Siskina (Cargo Owners)* v *Distos SA* [1979] AC 210 (refd)
4 *Re Busfield* (1886) 32 Ch D 123 (refd)
5 *Johnson* v *Taylor Bros & Co Ltd* [1920] AC 144 (refd)
6 *United Malayan Banking Corporation Bhd* v *Soo Lean Tooi & Ors* [1984] 1 MLJ 47 (follid)
7 *Salomon* v *Salomon* [1897] AC 22 (refd)
8 *AG* v *Great Eastern Railway Co* (1879-80) 5 App Cas 473 (refd)
9 *Evans* v *Bartlam* [1937] AC 473 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23(1)(b)
Rules of the High Court 1980 O11 r1

Vinayak Pradhan (*Nitin Nadkarni* with him) for the appellants.

JA Yeoh for the respondents.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): The question for determination in both these appeals is whether the learned judge of the High Court was correct in law in setting aside the order of the registrar dated 27 June 1986 granting the appellants leave to serve out of jurisdiction, a notice of concurrent writ of summons on the International Tin Council ('ITC') in London. Instead the learned judge made an order giving the appellants liberty to amend their statements of claim to exclude that part of the prayers relating to their monetary claim against the ITC, and conditional upon the said amendment, liberty be given to them to cause a fresh concurrent writ of summons to issue against the ITC in London or elsewhere in the United Kingdom. The substituted order was couched in such terms because he was of the view that unlike the other prayers sought in the writ, the High Court had no jurisdiction over the monetary claim against the ITC although surprisingly no order was deemed necessary to amend the pleadings relating to this particular cause of action.

It is common ground that the ITC is recognized under English law by the International Tin Council (Immunities and Privileges) Order 1972. (See *Maclaine Watson & Co Ltd* v *Department of Trade*[1]). Because of its immunity, the organization is not subject to the jurisdiction of the English courts except in respect of the enforcement of arbitration awards. (See *In Re International Tin Council*[2]). There is no dispute however that the ITC has no such immunity in Malaysia.

In each of these two appeals, the ITC and Datuk Keramat Smelting Sdn Bhd ('DKS') are being sued as co-defendants by Malaysian bankers who at all material times are carrying on business at their branches in Kuala Lumpur, Penang, London and elsewhere. In SCCA No 29 of 1987, Malayan Banking Berhad prays, inter alia, for the sum of $35m against ITC on a loan transaction effected in London, (references in this judgment are in British pound sterling). They also claim damages against DKS, and as against both ITC and DKS, there is common prayer for a declaration that the plaintiff banks are entitled to sell the tin metal in Malaysia comprised in DKS tin warrants given to them by ITC as pledges to secure the London credit facilities. In SCCA No 30 of 1987 the same orders are being prayed for by Bank Bumiputra Malaysia Berhad against both the defendants, except that the sum alleged to be due from ITC on the loan facilities granted by their London branch, is approximately $76m. It is an undisputed fact that ITC enjoys and has not waived its immunity from being sued in England, and unlike DKS, it does not reside or has its place of business in Malaysia. According to the statements of claim, DKS has refused to deal with the pledged tin stored in Penang as directed by the appellants, in accordance with the pledge agreement.

Before us, there is no cross-appeal by ITC or DKS against the substituted order made by the learned judge on 13 January 1987.

In setting aside the registrar's order, the learned judge came to the conclusion that in Malaysia, the jurisdiction of the High Court is restricted to those upon whom its process may be served within the territorial jurisdiction of the courts, and to this general rule the only exception is to be found in O 11 of the Rules of the High Court 1980 ['RHC 1980']. This conclusion is based on such English authorities as *Siskina (Cargo Owners)* v *Distos SA*[3] at p 254F, and *Re Busfield*.[4] The learned judge rejected the argument that s 23(1)(b) of the Courts of Judicature Act 1964 creates another exception to the general rule on extra-territorial jurisdiction of our courts.

Basing his conclusion on the cause of action and prayers sought in the statements of claim, the learned judge held that the monetary claim was outside the purview of O 11 r 1 of the RHC 1980, but the declaratory order sought against the ITC and DKS relating to the pledged tin fell under sub-paras (j) or (k) of the said order, and therefore the High Court had jurisdiction to exercise the extra-territorial jurisdiction to serve the notice of writ in England, either on the ground that the ITC was 'a necessary or proper party' to the pledge claim, or on the ground that the tin pledged by ITC as security for the loan facility was situated within jurisdiction. The learned judge, however, ruled that the monetary claim did not fall under any of the sub-paras of O 11 r 1. The relevant parts of sub-paras (j) and (k) of O 11 r 1 provides:

> ... service of notice of writ out of the jurisdiction is permissible with the leave of the Court in the following cases, that is to say -

(j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto;

(k) if the action begun by the writ is either by a charge of property situate within the jurisdiction (other than immovable property) and seeks the sale of the property, the foreclosure of the charge or delivery by the chargor of possession of the property but not an order for payment of any moneys due under the charge or by a chargor of property so situate (other than immovable property) and seeks redemption of the charge, reconveyance of the property or delivery by the chargee of possession of the property but not a personal judgment;

Before us, various points have been raised in argument by Mr Pradhan on behalf of the appellants, but we need only concern ourselves with whether the learned judge was correct in law in holding that s 23(1) of the Courts of Judicature Act 1964 had no legal effect whatsoever other than to embody the principle based on English law that the jurisdiction of the Malaysian High Courts is territorial. The main bone of contention of Mr Pradhan is that sub-para (b) of s 23(1) provides another exception to the general principle and confers extra-territorial jurisdiction on the High Court, on the ground that DKS being of the several defendants in both cases admittedly has its place of business within the local jurisdiction.

We shall now consider s 23(1) of the Courts of Judicature Act 1964 which provides:

> Subject to the limitations contained in Article 128 of the Constitution every High Court shall have jurisdiction to try all civil proceedings where -
>
> (a) the cause of action arose, or
> (b) the defendant or one of several defendants resides or has his place of business, or
> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
> (d) any land the ownership of which is disputed is situated,
>
> within the local jurisdiction of the Court ...

Section 23(1) appears to be the successor of s 47 read with the Second Schedule of the Courts Ordinance 1948. Paragraph 1 of the Second Schedule provided that: '... Jurisdiction and authority of the High Court in this country is of a like nature and extent as are exercised by the Chancery and King's Bench Divisions of the High Court of Justice in England.' With the repeal in 1964 of s 47 and the Second Schedule of the 1948 Ordinance by the Courts of Judicature Act, the civil jurisdiction of the High Court is now governed by s 23. Although s 23 refers to art 128 of the Federal Constitution, for the purpose of the present appeals, there is no necessity to deal with the constitutional provision because art 128 merely sets out the jurisdiction of the Supreme Court to which the provision of s 23 must of necessity be subject to. We have been reminded that under English law, jurisdiction of the courts is based on presence within the jurisdiction, and there is no equivalent statutory provision in England as our s 23(1)(b). Thus in *Johnson* v *Taylor Bros & Co Ltd*,[5] Viscount Haldane at p 153 said:

> Order XI r 1, does not lay down in imperative terms a new principle of law as to be applicable in all cases. What it does is, while leaving intact the old principle that by the law of England jurisdiction depends, broadly speaking, on presence within the jurisdiction, to enable the court to give special leave for service out of the jurisdiction in certain circumstances.

In the same case Lord Dunedin also opined:

> I think it is legitimate to begin by considering the genesis of the rule. I understand that jurisdiction according to English law is based on the act of personal service and that if this is effected the English law does not feel bound by the Roman maxim 'actor sequitur forum rei'. It is far otherwise in other systems where service is in no sense a foundation of jurisdiction, but merely a sine qua non before effective action is allowed.

In our view, service is not solely the foundation of jurisdiction of our High Courts. Apart from O 11 r 1, s 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where foreigners overseas are sued as co-defendants with local residents. Our attention has been drawn to the case of *United Malayan Banking Corporation Bhd* v *Soo Lean Tooi & Ors*[6] where the late Yusuf Abdul Rashid J had expressed the following opinion on s 23(1)(b):

> In my opinion it is the intention of the Legislature to confer jurisdiction on the High Court of Malaysia under s 23(1)(b) of Act 91 on a person who does not reside or has no place of business or has no property within the local jurisdiction of the said High Court if such person is one of several defendants who have sued where the other defendants are residing or have a place of business or have property within the local jurisdiction of the said High Court. Section 23(1)(b) of Act 91 would not have been worded so, had the intention of the Legislature been different. Should the words 'one of several defendants' been omitted, then the High Court would not have jurisdiction on a person who is one of several defendants and who does not reside within the local jurisdiction thereof even if the other defendants are residing therein. Since the provisions of s 23(1)(b) of Act 91 are in pari materia with the provisions of s 16(1)(b) of the Singapore Act, the latter provisions should admit of the same construction.

In interpreting s 23(1)(b) of the Courts of Judicature Act, we must in general assume that the legislature knows the then existing state of the law on the jurisdiction of the High Courts under the Courts Ordinance 1948, and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply. There can be no doubt here that Parliament intends to confer on the High Court extra-territorial jurisdiction in cases where more than one defendants are being sued, so long as one of the several defendants resides or has his place of business within Malaysia. As stated by Lord Halsbury LC in the *Salomon* case[7] at p 29, the court has 'no right to add to the requirements of the statute, nor to take from the require-

ments thus enacted. The sole guide must be the Act itself'. The provision of s 23(1)(a) does not impose any condition relating to cause of action or the nature of the prayers being sought before the High Court can assume jurisdiction. In our opinion, the learned judge erred in law in refusing to give any meaningful interpretation to the statutory provision by concluding that it was a mere restatement of the principle underlying O 11 r 1 of the RHC 1980 based on English Law. As stated by Lord Selborne LC in *AG* v *Great Eastern Railway Co*[8] at p 479, 'It would, however, be contrary to sound principle to imply such a condition, not expressed in the clause, if the words, as they stand would be sensible and operative without it.' Indeed, Lord Russell, in *Evans* v *Bartlam*[8] at p 481 ruled that, 'it would be adding a limitation which the rule does not impose or re-writing of the section which Parliament had failed to do so.' By imposing a requirement that the money claim should not be tagged on the appellants' claim for the declaratory orders, the learned judge had in our view erred in law by imposing a non-existent condition to the operation of s 23(1)(b).

In the circumstances, the only relevant issue to be determined in both these cases is whether DKS is one of several defendants who have a place of business within the local jurisdiction of the High Court. If so, then the High Court shall have the necessary jurisdiction not only over DKS but also over the co-defendant ITC, notwithstanding that the latter is not within the jurisdiction. On the facts, there is no dispute that DKS has a place of business within the local jurisdiction of the High Court and that they are one of the several defendants in both cases under appeal. The registrar was accordingly correct in law in granting the order that he did, and in the result, these two appeals should in our opinion, succeed. We are also in agreement with Mr Pradhan that in the event of the ITC having been wrongly joined as a co-defendant, there is nothing to stop them from applying for both the actions to be struck off for misjoinder of parties.

For reasons discussed, we order that both the appeals be allowed with costs here and in the courts below. The order of the registrar is accordingly restored. Finally we order that the deposit be refunded to the appellants.

Appeals allowed.

Solicitors: *Skrine & Co*; *Shearn Delamore & Co*; *Drew & Napier*.

Reported by *Prof Ahmad Ibrahim*

Cohen Lorraine Philis & Anor v Public Prosecutor and another appeal

SUPREME COURT (KUALA LUMPUR) - CRIMINAL APPEAL NOS 67 AND 66 OF 1987
ABDUL HAMID LP, HASHIM YEOP A SANI CJ (MALAYA), LEE HUN HOE CJ (BORNEO), ABDOOLCADER AND MOHAMED YUSOFF SCJJ
21 AUGUST 1989

Criminal Law - Dangerous drugs - Trafficking in - Defence that appellants were drug addicts - Evidence to show that appellants were drug addicts - Whether defence available to appellants to rebut presumption that they were trafficking in drugs - Dangerous Drugs Act 1952, ss 2, 37(da), 39(a) & 39B

Words and phrases - 'Trafficking' - Dangerous Drugs Act 1952, s 2

In this case the appellants had been searched at the International Airport at Bayan Lepas, Penang when they were preparing to leave Penang. Drugs were found wrapped in plastic bags in the underpants of both the appellants. They were charged for trafficking in dangerous drugs under s 39(b) of the Dangerous Drugs Act 1952. The learned trial judge convicted the first appellant on the charge and she was sentenced to death. He found the second appellant guilty of the amended reduced charge under s 39A of the Act and sentenced him to life imprisonment and six strokes of the rotan. The appellants appealed. On appeal it was argued, inter alia, that the first appellant was an addict and not a trafficker. The public prosecutor also appealed in respect of the conviction and sentence on the second appellant, it being argued that it was not open to the trial judge in view of the wide definition of 'trafficking' to reduce the charge against the appellant, as the defence of personal addiction is not available to a person accused of the offence of trafficking.

Held, quashing the death sentence against the first appellant and substituting a life sentence and dismissing the appeal of the second appellant:

(1) The learned trial judge in this case had not given consideration to the first appellant's defence that she was in fact an addict and not a trafficker, particularly in the light of the evidence of the bodily deformations as a result of intravenous injections and the medical evidence called on her behalf. It was necessary therefore to give the appellant the benefit of the doubt and the conviction and sentence under s 39B of the Dangerous Drugs Act 1952 should be quashed and a conviction and sentence under s 39A of the Act for possession of the drugs substituted therefor.

(2) The appeal by the second appellant should be dismissed.

(3) The defence of personal consumption is available to a person accused of trafficking in dangerous drugs under the Dangerous Drugs Act but whether it will succeed would depend on the facts of the case. To say that the defence of personal consumption is never available is to render meaningless the law on statutory presumption as stated in *PP* v *Yuvaraj*[2] which has been accepted by our courts and become part of our law.

(4) In this case on the facts there was no merit in the grounds of appeal of the public prosecutor and the conviction and sentence of the second appellant under s 39A of the Dangerous Drugs Act is affirmed.